Office - Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-128

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-128

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our opening brief, we showed that the court of appeals' holding that an indigent inmate who is segregated from the general prison population for more than 90 days pending investigation of a prison crime must either be appointed counsel or returned to the general prison population constitutes a radical departure from this Court's explication of the Sixth Amendment right to counsel. Respondents and amici offer an assortment of rationales in an effort to support the decision below. But they cannot overcome the fact that the Sixth Amendment applies only to "criminal prosecutions" and that no such prosecution was pending prior to their indictments. Furthermore, respondents' briefs make it quite clear that the record cannot support the court of appeals' summary conclusion that the absence of appointed counsel prior to indictment must have deprived them of a fair trial.

1. Respondents Mills and Pierce (Br. 14-19) begin by accusing us of distorting the record in our explanation of the important security considerations that underlie administrative detention of an inmate-suspect

during the time he is under criminal investigation. Amicus American Civil Liberties Union (ACLU) goes further, urging (as the basis for a due process argument) that the government used administrative detention as a tactical weapon to gain an unfair advantage over respondents. See ACLU Br. 16-17, 42-46. Those characterizations are simply wrong.[1]

a. Common sense alone requires the conclusion that an inmate whom the FBI suspects of brutally murdering another inmate is likely to constitute a

---

[1] We note that respondents and amici attempt to color this case by their descriptions of conditions in administrative detention. See, *e.g.*, Reynoso Br. 2-3; Mills Br. 2-3; ACLU Br. 4, 53-54 n.*. Such descriptions are irrelevant to the Sixth Amendment issues raised by this case; at most, they might raise issues under the Fifth or Eighth Amendments. In any event, we note that the descriptions in the briefs are not always consistent with the record or with each other. *E.g.*, compare Mills Br. 2 (respondents were confined to three-by-five foot cells) with Reynoso Br. 2 (respondent was confined t a four-by-six foot cell); compare Gouveia Br. 19 (respondent had no access to a prison library) with Pet. App. 3a (respondents had access to legal materials); compare Reynoso Br. 2 (respondent was permitted only one telephone call per month to be made in the presence of a counselor, guard or case manager) with Pet. App. 3a (respondents could make unmonitored phone calls) and J.A. 62 (affidavit of William Kindig, Supervisor of Administrative Detention Unit at Lompoc) (no limitation on number of telephone calls that may be made by an inmate housed in ADU; when an inmate wishes to speak with an attorney a special attempt is made to make an unmonitored telephone available quickly).

For the Court's information, we are lodging with the Clerk of the Court, and providing to respondents' counsel, copies of LOM 5270.5, dated January 21, 1983, a Lompoc institution supplement on the subject of inmate discipline, which includes information on administrative detention and disciplinary segregation at Lompoc.

threat to the security of the institution and the safety of other inmates and staff if permitted to remain in the general prison population. As we noted in our opening brief (at 27-29), concerns about "investigations" by inmate-suspects in the form of retribution against possible witnesses are not hypothetical, but are confirmed by experience. This Court in *Hewitt* v. *Helms*, No. 81-638 (Feb. 22, 1983), recognized that administrative detention of an inmate pending a criminal investigation is not an arbitrary measure, but instead serves significant security purposes, including protection of potential witnesses and prevention of subornation of perjury. See slip op. 12, 14-15, 16 n.9.[2]

---

[2] Respondents cite *Hughes* v. *Rowe*, 449 U.S. 5 (1980), in support of their contention that inmates under criminal investigation may not "presumptively be deemed security risks because of the abstract possibility that they may impede the Government's investigation" (Mills Br. 17). But *Hughes*, which involved an inmate's action against prison officials under 42 U.S.C. (Supp. V) 1983, presented a very different situation from this case. In *Hughes*, the petitioner had been placed in segregation pending investigation by prison officials of his consumption of a homemade alcoholic beverage. There was no pending criminal investigation of petitioner's actions (which amounted only to a violation of prison regulations), and prison officials did not even allege that petitioner had been placed in segregation because of security concerns. Moreover, since petitioner had already admitted his guilt at the time he was placed in segregation, the Court concluded that there was no real likelihood that he would fabricate alibis or intimidate witnesses. 449 U.S. at 13-14 n.12. In contrast to *Hughes*, respondents here were under criminal investigation for the murder of another inmate, and they never admitted their guilt. Thus, the security concerns underlying segregation in this case were far more significant than those in *Hughes*. See also *Hewitt* v. *Helms*, slip op. 8 (noting that *Hughes* was "essentially a pleading case rather than an exposition of the substantive constitutional issues involved").

As Bureau of Prisons regulations indicate, pendency of a criminal investigation alone would not support administrative detention of an inmate-suspect; prison officials must in addition make a specific finding that the inmate poses a security threat. See 28 C.F.R. 541.22(a). In fact, security is the primary consideration in any decision to keep an inmate in administrative detention.[3] Continued administrative detention pending a criminal investigation is used primarily in connection with acts of physical violence, such as murder or assault. An inmate-suspect normally would remain in the general prison population if he were under criminal investigation for, *e.g.*, tax fraud or an offense committed outside of prison. An inmate-suspect who is transferred from the institution where a crime occurred normally would be returned to the general prison population. As respondent Gouveia notes (Br. 2, 16), he was released to the general prison population following his transfer to Leavenworth prison.

Respondents seem to suggest that the government was required to make a factual showing that each respondent remained a security threat throughout the entire period of investigation. But in the case of inmates like respondents, who were suspects in brutal murders of other inmates, the security reasons for continued segregation from the general prison population ordinarily would be so self-evident to any prison official that detailed findings would be regarded as unnecessary.[4] The Bureau of Prisons

---

[3] The other conditions listed in the regulations (*e.g.*, pendency of an investigation, need for protection from other inmates) serve to confine use of the security rationale to those situations in which administrative detention is needed most.

[4] Security concerns are particularly obvious in cases like this one, in which officials believe that prison gangs are in-

forms that are in the record of this case indicate that prison authorities made express findings that the inmates suspected of the murders posed serious threats to other inmates and/or to the security of the institution. See, *e.g.*, J.A. 10, 12, 138, 139.[5] Respondents did not introduce comparable forms relating to the later portions of their administrative detention, but it can be presumed that prison authorities continued to make the findings prescribed by the regulations. See 28 C.F.R. 541.22(a) and (c); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). That presumption is confirmed by forms we have located in Bureau of Prisons files, which indicate that prison officials concluded at 30-day intervals that the original reasons for placement of respondents in administrative detention continued and, in addition, that four respondents were pending transfer while authorities awaited vacancies in the control unit of the federal correctional facility at Marion, Illinois (the highest security level institution in the federal prison system).[6]

---

volved in a murder. See, *e.g.*, Sept. 16, 1980 Tr. 9-24 (referring to Mexican Mafia affiliations of *Gouveia* respondents); Mills Tr. 562-563 (referring to Aryan Brotherhood connection of respondent Mills). In such cases, rival gangs may engage in retaliation against suspects who remain in the general prison population.

[5] Respondents object (Mills Br. 15 n.10) that the findings by prison officials were part of a preprinted form. But that concession to administrative convenience and regularity cannot undermine the validity of the findings. The record contains no suggestion that prison officials did not make the prescribed findings for a particular inmate before signing the form.

[6] Because several respondents have asserted that prison officials did not continue to find them to be security risks dur-

b. Amicus ACLU's contention that the government uses administrative detention of inmate-suspects, combined with preindictment delay, as a tactical weapon to gain an unfair advantage over inmate-suspects is wholly without foundation in the record. Bureau of Prisons records show that prison officials continued to detain respondents on the basis of security concerns associated with the criminal investigations of the murders and the pending transfers of respondents to the Marion Control Unit. See page 5 & note 6, *supra*. The courts below found that the delays in indicting both the *Gouveia* and *Mills* respondents were not motivated by tactical concerns on the part of the government and were at least in part due to the difficulties typically experienced by the government in investigating prison crimes. The district court in the *Gouveia* case concluded (J.A. 92):

> I do not * * * find the delay was motivated by an intent to gain a tactical advantage over the defendants, any motivation by the government, and I find no bad faith on the part of the government. It's apparent from the Court's examination of what has occurred that there were a large number of witnesses to be interviewed, and certainly a correctional setting can complicate in many ways such an investigation.

The court of appeals panel that decided the first appeal in the *Mills* case likewise concluded (Pet. App. 38a n.2): "There was no evidence of intentional gov-

---

ing their detention (see Segura Br. 18; Mills Br. 3 n.4, 14-15), and because the ACLU suggests that the government continued to hold respondents in administrative detention for tactical reasons, we are lodging with the Court copies of the 30-day review forms we have been able to locate in Bureau of Prisons files. We are providing copies of each respondent's forms to his counsel.

ernment delay. The investigation was ongoing until defendants were indicted."[7] As this Court has held, there is no constitutional requirement that prosecutors cease their investigations as soon as they gather the minimum amount of evidence that would

---

[7] These findings are fully supported by the record. In both cases the government was required to interview scores of witnesses and to make special arrangements for the safety of inmates who expressed a willingness to cooperate. In the *Gouveia* case Assistant United States Attorney Bert Deixler and FBI agent James Wilkins submitted affidavits explaining the steps taken from the time of the murder in November 1978 to the indictment in June 1980; Deixler provided further explanation during the hearing on the motions to dismiss the indictment. Among the difficulties they outlined were the need to interview over 100 individuals, delays in analyzing the large amount of physical evidence, the discovery in the fall of 1979 that it would be necessary to obtain prints of the sides of respondents' hands and scheduling of grand jury appearances for this purpose, the need to double check the accounts of potential grand jury inmate-witnesses to make sure they were truthful, the need to make arrangements for potential government witnesses to enter the witness protection program, and lack of evidence establishing respondent Segura's participation in the murder until February 1980. See J.A. 50-52 (Wilkins affidavit); C.R. No. 62, at 18-20 (Deixler affidavit); Sept. 8, 1980 Tr. 124-131.

In the *Mills* case Assistant United States Attorney Richard Drooyan and FBI agent Thomas Mansfield submitted affidavits describing the investigation. They explained that from August 1979 (when the murder occurred) to March 1980 (when the indictment was handed down) FBI investigators interviewed over 100 individuals, that the grand jury heard testimony from inmate-witnesses in October and November 1979 and in March 1980, that arrangements had to be made to transfer those witnesses to other prisons for security reasons, that FBI laboratory reports had been received in November and December 1979 and in February 1980, that the FBI report was completed in March 1980 and was over 200 pages long, and that two witnesses did not provide key evidence until March 1980. J.A. 140-146.

support an indictment. Rather, they may, inter alia, continue to gather evidence that would support a finding of guilt beyond a reasonable doubt. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 790-795 (1977); *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). In the prison setting, investigations are complicated by the additional problem of making security arrangements (often involving transfers to distant institutions) for inmates who indicate a willingness to cooperate if the government will take steps to ensure their safety.[8]

2. As we explained in our opening brief (at 19-22), this Court has held consistently (and for sound reasons) that the Sixth Amendment right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against" a defendant. *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion). While respondents and amici do not point to any adversary judicial proceeding that was initiated prior to the indictments in this case, they attempt to characterize respondents' administrative detention in ways that suggest it should trigger

---

[8] Assuming arguendo that in some cases prison officials might impose administrative detention pending a criminal investigation without a valid reason, an inmate-suspect presumably could apply to a district court for an order returning him to the general prison population. The district court in the *Gouveia* case specifically found that during the time respondents were in administrative detention they had "the right to telephone, write, and the right to file complaints and petitions." Sept. 8, 1980 Tr. 138.

Of course, any claim based on alleged misconduct by the government in segregating an inmate-suspect without a valid reason or delaying an indictment for tactical reasons would be based on the Due Process Clause of the Fifth Amendment, rather than on the Sixth Amendment right to counsel.

the Sixth Amendment right to counsel. These attempts are unsuccessful.

Respondents Mills and Pierce suggest (*e.g.*, Br. 12) that during the time they were in administrative detention, they were being held "to answer impending criminal charges." But despite the similarity in sound, a possible "impending" charge is not the same as an actual "pending" charge. During the time respondents were in administrative detention there were no criminal charges against them and thus nothing for them to "answer".[9] Of course, it is clear that the pendency of administrative charges at the initial stage of their detention did not entitle respondents to appointment of counsel. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974).[10]

---

[9] Respondents misuse the term "holding to answer," which has a specific meaning in the area of criminal procedure. Fed. R. Crim. P. 5.1(a), which relates to the probable cause finding made by a magistrate, provides that "[i]f from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court." There was, of course, no proceeding in which any of the respondents was "held to answer" by a magistrate prior to the time of the indictments in this case.

[10] Mills and Pierce also suggest (Br. 13 n.7) that arrest alone (as opposed to arrest and holding to answer a criminal charge) is enough to constitute an "accusation" for speedy trial purposes, citing *Dillingham* v. *United States*, 423 U.S. 64 (1975). See also ACLU Br. 22. But the petitioner in *Dillingham* in fact was held to answer a criminal charge. After his arrest in April 1970 and the filing of a criminal complaint, Dillingham was bound over to the grand jury by a magistrate, who set bail following waiver of a preliminary hearing. In May 1970 Dillingham was released on a $1,500 bond, and in February 1972 he was indicted with 15 other defendants. See *United States* v. *Palmer*, 502 F.2d 1233, 1234 (5th Cir. 1974). Because formal criminal charges had been

Amicus ACLU suggests (Br. 14-33) that the Sixth Amendment right to counsel should be triggered by "arrest and significant detention." Of course, segregation from the general prison population for administrative purposes does not constitute an "arrest," and continuation of segregation does not amount to "significant detention" in the case of inmates who otherwise are being "detained" in prison on a long term basis as a result of sentences for previously committed crimes. Like the court of appeals and respondents, the ACLU stresses that outside prison a suspect who is arrested following a crime and brought before a magistrate would be entitled to appointment of counsel. The ACLU suggests that the rules of criminal procedure do not operate in the normal manner in the prison setting, since the government has no need to arrest a suspect who is already in prison. In the ACLU's view, additional constitutional protection is needed so that the government could not delay indefinitely making an accusation, thereby postponing the occasion for appointment of counsel.

The ACLU's reasoning stands the matter on its head by ignoring the reasons why civilian arrestees are charged and obtain the appointment of counsel. Except in cases in which counsel is appointed for a particular judicial proceeding (such as a preliminary hearing), preindictment appointment of counsel is really an indirect consequence of the operation of the Due Process Clause, rather than a result of any policy underlying the Sixth Amendment counsel requirement. A suspect who is not a convicted prisoner may

---

brought against Dillingham by arrest and filing of a criminal complaint, which remained pending against him, the United States conceded in the Supreme Court that the period between his arrest and indictment should be included in determining whether he had been deprived of his right to a speedy trial. See 74-6738 U.S. Memo. in Opp. at 4-7 (1975 Term).

not have his liberty restricted (either by pretrial incarceration or by bail conditions) except as a result of the pendency of judicial criminal proceedings; to impose such restraints on the basis of nothing more than a criminal investigation would violate the individual's due process liberty rights. The judicial proceedings required by the Due Process Clause in such cases coincidentally trigger appointment of counsel. But if a suspect has already been deprived of his right to liberty by virtue of a prior conviction and sentence of incarceration,[11] there is simply no need to arrest him or charge him with a crime before the government and the grand jury have determined that there should be a prosecution.

The ACLU's claim amounts to the contention that prosecutors should have initiated adversary judicial proceedings at an earlier point, so that respondents would have been entitled to appointment of counsel. But "[t]here is no constitutional right to be arrested" in order that the right of counsel may attach earlier than it otherwise would. *Hoffa* v. *United States*, 385 U.S. at 310. Appointment of counsel is not an end in itself, but rather a right that attaches when other events—*i.e.*, those that accompany the initiation of adversary judicial proceedings—create a special need for counsel. If those events do not take place prior to indictment (as they did not in this case), the Con-

---

[11] This Court has held that an inmate has no constitutionally protected liberty interest in remaining in the general prison population, at least in the absence of mandatory standards governing removal from the general population. See *Hewitt* v. *Helms*, slip op. 5-11. Nor does an inmate have any liberty interest in avoiding transfer to another institution. See *Olim* v. *Wakinekona*, No. 81-1581 (Apr. 26, 1983), slip op. 10-11; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976); *Meachum* v. *Fano*, 427 U.S. 215, 223-225 (1976).

stitution does not require preindictment appointment of counsel.

Respondent Reynoso errs in contending (Br. 23-27) that the government had committed itself to prosecute long before the indictments in these cases. Respondents themselves insist that these were close cases. See, *e.g.*, Mills Br. 4-6. Steven Kinard, the key prosecution witness in the *Gouveia* case, did not agree to testify for the government until the eve of the first trial; even with Kinard's testimony, the first trial resulted in acquittal of co-defendant Flores and a mistrial as to the murder charges against respondents. The government's affidavits indicate that it was still interviewing witnesses and receiving FBI laboratory reports in 1980 (see note 7, *supra*), and that until February 1980 the government did not have evidence that would support indictment of respondent Segura (see J.A. 52; Sept. 8, 1980, Tr. 124-125, 130). In the *Mills* case Assistant United States Attorney Drooyan stated in his affidavit that he did not decide to present the matter to the grand jury for indictment until he had received new evidence from inmates Cook and Medina in March 1980 (J.A. 140-141).[12]

3. In apparent recognition that this Court's precedents do not support their right to counsel claims, re-

---

[12] Respondents Mills and Pierce (Br. 3) and amicus ACLU (Br. 3-4, 42-43, 45-46) incorrectly state that prison officials invoked a provision of the regulations relating to "pretrial inmates," 28 C.F.R. 541.22(a)(6)(i), as the ground for continuing to hold respondents in administrative detention. The Bureau of Prisons considers "pretrial inmates" to be those who are under indictment and who are awaiting trial (as were the *Gouveia* respondents during the time they were housed in the Los Angeles County Jail, see U.S. Br. 4 n.3). Since respondents were serving sentences for other crimes and had not been indicted on new charges during the time they were in administrative detention at Lompoc, they were not "pretrial inmates."

spondents and amici contend that it is appropriate to disregard some of those precedents in prison cases. See, *e.g.*, Ramirez Br. 18-19; Segura Br. 14-16; Mills Br. 28-38; National Legal Aid and Defender Association (NLADA) Br. 25-36. There is no question that the prison setting has special characteristics and that the scope of respondents' rights must be defined in light of those characteristics. But in general, constitutional rights are more, rather than less, limited in the prison setting. See, *e.g.*, *Hewitt* v. *Helms*, slip op. 5-7; *Wolff* v. *McDonnell*, 418 U.S. at 561-563. In any event, the purported distinctions between prison and nonprison settings identified by respondents and amici do not suggest that inmate-suspects should be constitutionally entitled to appointment of counsel at an earlier stage than other suspects.

Respondents object that the failure to appoint counsel during the period an inmate-suspect is in administrative detention gives the government an unfair advantage in investigating and preparing its case and that the government's "head start" in prison cases creates an inequity of constitutional proportions. See, *e.g.*, Gouveia Br. 12-17; Segura Br. 20-21; Ramirez Br. 23. But in many cases, both inside and outside prison, the government has the initial opportunity to investigate and, at least in some instances, to preclude others from investigating for some period of time. For example, government authorities often secure the scene of a crime, with the result that defendants and defense counsel are denied access to it until long after the crime has occurred. Of course, the government has no duty to inform any individual that he is a suspect or to keep him advised about the course of an investigation. Grand jury proceedings are conducted in secrecy, and an individual may never learn that he is a target until an indictment is handed down. See Pet. App. 26a. In addition, there is no general con-

stitutional right to discovery of the prosecution's evidence in a criminal case and no constitutional requirement that the prosecution reveal before trial the names of witnesses who will testify unfavorably to the defense. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561 (1977). This Court has never suggested that the resulting "head start" by the government poses constitutional problems.[13]

Respondents Mills and Pierce devote particular attention (Br. 29-35) to the difficulties defense counsel face in investigating prison crimes. They point first to the shifting composition of the prison population and the difficulty of tracing inmates who have been transferred or released (*id.* at 30-31). As we pointed out in our opening brief (at 35-36, 42-43), prison inmates may be considerably less transient and more susceptible to identification than witnesses to some nonprison crimes because of the controlled conditions in prisons and availability of inmate records.[14] Sev-

---

[13] Respondents Mills and Pierce complain (Br. 40-41, 44) in particular that they were disadvantaged because inmates who were interviewed first by FBI investigators allegedly fabricated accounts of their activities on the day of the murder. When defense counsel eventually interviewed them, those inmates were reluctant to testify for the defense because of their prior inconsistent statements. The willingness of inmates to make false statements to authorities can hardly constitute a ground for concluding that a Sixth Amendment right to counsel exists at the preindictment stage. In any event, even if counsel had been appointed for respondents after they had been held in administrative detention for 90 days, as the court of appeals required, respondents presumably could not have prevented FBI investigators from being the first to interview any potential inmate-witness.

[14] Because Lompoc is a high security level institution, the average length of sentence of inmates there is quite long. Thus, it is likely that most inmates who might have witnessed

eral respondents suggest that prison records and locator systems proved inadequate in this case. See, *e.g.*, Mills Br. 21; Ramirez Br. 25 n.13; Gouveia Br. 16. But if that is so, it is difficult to explain how respondents managed to locate so many inmate-witnesses. The defense in the *Mills* case presented 23 inmate-witnesses, while the defense in the *Gouveia* case presented 19 such witnesses.[15] While prison records may not be perfect in every respect, courts cannot ignore the possibility that a defendant will often be able to use such records to track down alleged missing witnesses.[16]

---

a crime at Lompoc would still be in the federal prison system at the time of indictment.

[15] Problems with inmate records did not necessarily prevent respondents from eventually locating witnesses. Respondent Gouveia complains (Br. 16) that there was no record of an inmate named Macias on the roster for M unit that was provided to him. However, Macias himself testified at trial. See pages 25-26, *infra*.

[16] As we noted in our opening brief (at 36-39), there are other ways in which an inmate himself can ensure that there is a record of information that he may eventually need for his defense. Respondents and amici object that the alternatives we suggest are impractical and would require inmates to incriminate themselves. See, *e.g.*, Mills Br. 36-37; Ramirez Br. 23-25; ACLU Br. 28-29. Those objections are misguided. We do not, for instance, suggest that inmates are required to speak to FBI investigators or staff representatives. We merely point out that an inmate who wishes to preserve a record of witnesses or his account of his whereabouts on the day of a crime could avail himself of these opportunities for doing so, and that it is reasonable to anticipate that many erroneously suspected inmates would do so. At least some Lompoc inmates do use staff representatives. See our Brief in Opposition in *Young-Buffalo* v. *United States*, cert. denied, No. 83-5505 (Jan. 16, 1984), slip op. 7 note, describing the petitioner's offer of a statement through his staff representative (a physician's assistant) at the Lompoc disciplinary hearing. A court should at least consider the possibility that an inmate

Respondents Mills and Pierce next stress (Br. 31-37) the problems created by the special value system of prison inmates, including a code of noninvolvement and noncooperation and an inclination to make untruthful statements to authorities. But it is these very factors that make it particularly difficult for the *government* to conduct investigation of prison crimes and to gather sufficient evidence to warrant initiation of a prosecution. FBI investigators in these cases interviewed scores of witnesses in an effort to obtain reliable evidence concerning who was responsible for the murders. See note 7, *supra*. Respondents allege (Mills Br. 44) that many of these witnesses lied to FBI investigators, but gave truthful statements to defense counsel at a later time. Assuming it was the initial statements (rather than the later testimony) that were false, this would merely illustrate the special difficulties the government encounters in uncovering the true version of events surrounding a prison crime.

Respondents' vivid descriptions of the difficulties faced by authorities in obtaining cooperation and truthful statements from inmates tend to disprove their contentions (see pages 13-14, *supra*) that there

---

did use, or could have used, available means of investigating or preserving evidence.

Respondent Gouveia takes issue (Br. 2) with the statements in our opening brief (at 3, 39 n.29) that he was released to the general prison population between November 22 and December 4, 1978, and thus could have engaged in investigation or otherwise preserved evidence. The affidavit of FBI agent Wilkins (J.A. 50) supports our statements. However, Gouveia's own affidavit (see J.A. 44-45) does not mention any release to the general prison population during this period. Records we have obtained from the Bureau of Prisons appear to confirm Gouveia's statement that he was not released to the general prison population until he was transferred to Leavenworth at the end of February 1979.

is some great imbalance between the investigative ability of the government, on the one hand, and that of inmate-suspects, on the other. While the government may have access to evidence at an earlier stage than defense counsel, the government is likely to have more difficulty in obtaining cooperation and truthful statements.[17] And, of course, as we noted in our opening brief (at 43), the inmate-suspect always has the ultimate advantage in a later criminal proceeding—the prosecution's burden of proving guilt beyond a reasonable doubt.

4. Respondents and amici cite in support of their position cases such as *Powell* v. *Alabama*, 287 U.S. 45 (1932), in which this Court has recognized that one of the functions of counsel is to assist in preparation of a defense. See, *e.g.*, Ramirez Br. 16; Reynoso Br. 29; Mills Br. 25-27; NLADA Br. 32. But those cases refer to preparation of a defense in the period following initiation of adversary judicial proceedings. Of course, if counsel were appointed on the day of trial of a serious felony charge, as was the case in *Powell*, a court would ordinarily conclude that a defendant had been deprived of the Sixth Amendment right to counsel. There is no contention in this case, however, that respondents' counsel had inadequate time in which to prepare a defense. Counsel for the *Gouveia* respondents were appointed on July 14, 1980; the first trial began on September 16, 1980, and the retrial began on February 17, 1981. See J.A. 1-2. Counsel for the *Mills* respondents were appointed on April 21, 1980; trial did not begin until January 1982, following grant of respondents' motion to dismiss the indict-

---

[17] See, *e.g.*, *Young-Buffalo* v. *United States*, *supra*, involving a brutal murder of a fellow-inmate at Lompoc. Although approximately 100 inmates saw the petitioner smash the skull of the victim and nearly decapitate him, no inmate testified against petitioner at trial (83-5505 U.S. Br. in Opp. at 2).

ment and reversal on an interlocutory appeal. See J.A. 120. Thus, counsel in both cases had many months (close to two years in the *Mills* case) in which to investigate and prepare for trial. Respondents do not suggest that they lacked sufficient time to pursue all significant leads or that they would have taken any additional steps if they had had more time. Review of the extensive trial transcripts in these cases leaves no doubt that each respondent presented substantial evidence in support of his defense and was vigorously represented and that appointment of counsel could not have been further from the " 'sham' " referred to at NLADA Br. 35-36 (quoting *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940)).

Respondents contend, however, that they could have prepared better defenses if their counsel had begun investigations prior to the date the indictments were handed down. As an initial matter, we doubt very much that most appointed counsel conduct any extensive investigation during the preindictment stage, since discovery of the government's case is not available until after indictment. Thus, until counsel learns the time the government believes the crime occurred, he cannot search for alibi witnesses; and until he receives copies of the government's laboratory reports he cannot know what physical evidence may be available for analysis. But even assuming preindictment investigation would have allowed respondents to prepare better defenses, the same presumably would be so in many nonprison cases. In many instances it might be argued that an earlier indictment, a longer period for investigation, or various types of assistance from the government would have permitted a defendant to prepare a stronger case. But the Constitution does not require a perfect investigation. To the extent the Sixth Amendment right to counsel encompasses a reasonable opportunity to prepare a defense,

that opportunity is afforded when counsel is appointed at the initiation of adversary judicial proceedings and is given ample time prior to trial to prepare a defense.[18]

5. Respondents and amici raise various objections to our contention that, assuming arguendo there was a violation of the Sixth Amendment right to counsel in this case, the court of appeals failed to require the sort of specific showing of prejudice that would justify dismissal of the indictments. Respondents Mills and Pierce contend (Br. 46-50) that we are urging a departure from the standard set out by this Court in *United States* v. *Morrison*, 449 U.S. 361 (1981). But in fact we rely on *Morrison*. Our point is that the Court's decision in this case surely requires more than either a presumption or the sort of conclusionary finding of prejudice on which the court of appeals purported to rely in this case. *Morrison* does leave room for a showing that violation of the Sixth Amendment right to counsel creates a "substantial threat" of prejudice. See 449 U.S. at 365. But the Court in *Morrison* also stressed the extraordinary nature of the remedy of dismissal of the indictment (*ibid.*). It seems clear that, in a case in which it is urged that the court should dismiss with prejudice indictments for brutal

---

[18] Respondents and amicus ACLU also cite this Court's precedents for the proposition that counsel must be appointed for any "critical stage." They contend that investigation is "critical" and that respondents were therefore entitled to appointment of counsel prior to indictment to aid them in investigating the murders. See, *e.g.*, Segura Br. 17-22; Ramirez Br. 17-20; Mills Br. 25-26; ACLU Br. 24-27. But, as amicus NLADA acknowledges (Br. 24-25), it is the "critical stage" of a *prosecution* that triggers the Sixth Amendment right to counsel under this Court's precedents. Until the indictments in this case, there was no prosecution and thus no "critical stage."

murders, a "substantial threat" of prejudice must amount to more than speculation that, *e.g.*, a few unidentified missing witnesses might have testified in a manner that would have bolstered a defendant's version of the facts.

Respondents criticize us for contending that they must show some sort of actual (rather than hypothetical) prejudice in order to justify dismissal of the indictment in a right to counsel case. They maintain that courts should apply a less stringent standard for evaluating prejudice in Sixth Amendment cases, as opposed to Fifth Amendment cases. See, *e.g.*, Mills Br. 47-50. It is true that in some Sixth Amendment cases this Court has been willing to presume prejudice. For example, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court ordered a new trial for a defendant who had been unrepresented at trial without inquiring into whether he had been prejudiced by the lack of counsel. But the absence of counsel at trial goes to the heart of the Sixth Amendment right; moreover, the remedy of a new trial is far less drastic than dismissal of the indictment. Here, in contrast, assuming the failure to appoint counsel prior to initiation of adversary judicial proceedings falls within the Sixth Amendment right, it is surely at its fringes; and dismissal of the indictment is an extraordinary remedy. In such circumstances, it is clearly appropriate to require some showing of how the failure to appoint counsel in the preindictment period affected the defendant's ability to have a fair trial. Compare, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

Mills and Pierce urge that it is inappropriate to analyze the allegations of prejudice in this case in the same manner as claims of prejudice from preindictment delay. Presumably they take this position because they realize that they are unable to meet the

standard established by the preindictment delay cases.[19] But it seems entirely reasonable to apply that analysis to this case, since the types of harm alleged and the remedy sought in the two types of cases are quite similar.

Amicus ACLU contends (Br. 46-53) that the appropriate standard for measuring prejudice in this case is a "relaxed" standard, modeled on that set out in *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982). We disagree.

In *Valenzuela-Bernal* the Court considered a claim that the government's deportation of aliens who were witnesses to the crime deprived the defendant of his Sixth Amendment right to compulsory process and his Fifth Amendment right to due process. The Court concluded that respondent could not establish a violation of either the Fifth Amendment or the Sixth Amendment merely by showing that deportation had deprived him of the testimony of the aliens; rather, he was required at least to make some plausible showing of how their testimony would have been material and favorable to his defense. 458 U.S. at 867-872. The Court also held that sanctions may not be imposed on the government for deporting witnesses unless a defendant "makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 872-874.

We question the extent to which *Valenzuela-Bernal* should be characterized as generally having established a "relaxed" standard for proof of prejudice. That characterization appears to arise from the

---

[19] Mills and Pierce abandoned their due process claims based on preindictment delay in their most recent appeal. See their court of appeals' brief in Nos. 82-1206 and 82-1278.

Court's suggestion (458 U.S. at 870) that defense counsel's inability to interview deported aliens because they are beyond the reach of the court's process "may well support a relaxation of the specificity required in showing materiality." The Court explained (*ibid.*) that such a situation nevertheless would not afford the basis "for wholly dispensing with such a showing." But in any event it would be inappropriate to apply any "relaxed" standard in this case, which differs in important respects from *Valenzuela-Bernal*. In the latter case there was no dispute that the deported aliens existed, that they were percipient witnesses, and that the government was aware of that fact when it deported them. Here there is no firm evidence that most of the alleged missing witnesses actually existed or that they would have been able to provide useful testimony. If the government released or transferred such individuals, it presumably did not do so in the knowledge that they were likely to be potentially important defense witnesses. Finally, release or transfer of inmates normally would not place them beyond the reach of the court's process. In view of the significant potential for fabrication of fictitious missing witnesses in cases like this one, a high standard for showing of prejudice is particularly appropriate.

6. In response to our contention that the court of appeals failed to require an adequate showing of prejudice to support dismissal of the indictments, respondents continue to offer sweeping generalizations about missing witnesses and faded memories. See, *e.g.*, Ramirez Br. 29, 32; Segura Br. 26-27; Mills Br. 40-41. Respondents do not dispute that they were able to produce large numbers of defense witnesses, nor do they suggest that there is any key point made by the government during trial that they were en-

tirely unable to counter because of an inability to investigate thoroughly.

Several respondents offer more specific allegations of prejudice. But even these are insufficient to establish that they failed to receive a fair trial and that dismissal of the indictments was required.

Respondent Reynoso contends (Br. 3, 5-6, 9, 13-14, 17) that he was unable to locate two witnesses, an inmate named "Sam" and a black prison guard, who could corroborate his statement to the FBI (J.A. 23) that between 2:00 and 3:00 p.m. on the day of the murder he was exercising and playing shuffleboard in the prison gymnasium.[20] He suggests (Br. 6 n.3) that the missing testimony would have served to impeach a witness, Gene Newby, who testified to having seen him with other respondents disposing of bloody clothing in the early afternoon on the day of the murder. In fact, Newby testified to having seen respondents shortly after noon (Tr. 1011, 1160). A pathologist testified that Trejo's death occurred between 12:00 and 1:00 p.m. (Tr. 160-164), and two alibi witnesses testified that between 10:00 a.m. and 1:10 p.m. Reynoso was watching a football game (Tr. 1415-1420, 1520-1525). The testimony of the two alleged missing witnesses about Reynoso's activities later in the afternoon would have been of little incremental benefit to his alibi defense.

Reynoso also maintains (Br. 17) that he was prejudiced because he was unable to call as a witness, or

---

[20] Contrary to his present claim (Br. 13), Reynoso knew the name of the prison guard who allegedly saw him at the gymnasium. See J.A. 15. Reynoso stated in his pretrial affidavit that he learned after the murder that the guard was no longer employed at Lompoc (*ibid.*). The record does not appear to indicate that Reynoso attempted, through the Bureau of Prisons or by other means, to ascertain the guard's whereabouts. See, *e.g.*, *id.* at 21-22.

to obtain the statement of, inmate Michael Thompson, who was alleged by the *Gouveia* respondents to have admitted committing the murder of Trejo and who died prior to trial. Of course, Thompson's death and the resulting inability of the defense to call him as a witness were not the result of failure to appoint counsel prior to indictment, but rather the consequence of the passage of time between the murder and the trial. Moreover, Reynoso's claim that Thompson would have incriminated himself had he been available to testify is sheer speculation. Nor is there any reason to believe Thompson would have admitted to the murder and exonerated respondents if he had been interviewed by defense counsel prior to his death.[21]

Both Reynoso (Br. 16) and Gouveia (Br. 19-20) contend that they were prejudiced by the inability of defense witnesses to recall crucial events that took place during the period when the murder was committed. In support of that contention, they rely primarily on testimony at the first trial, which was aborted when the jury was unable to reach a verdict. However, many of the defense witnesses who were unable to recall events during the first trial suddenly regained their recollections of those events during the second trial. For example, Reynoso and Gouveia cite inmate Estrada's inability to recall either the date of the murder or a conversation he had with Michael Thompson on that day concerning the disposal of some

---

[21] Even if Thompson had given such a statement, it is doubtful whether it would have been admissible. Fed. R. Evid. 804(b)(3) excludes exculpatory hearsay statements tending to expose the declarant to criminal liability "unless corroborating circumstances clearly indicate the trustworthiness of the statement." Reynoso acknowledges (Br. 29) that the trial court excluded testimony concerning an admission by Thompson to another inmate on the ground, inter alia, that it lacked the indicia of trustworthiness required by the Rule. See Tr. 2104, 2495.

knives Thompson allegedly was carrying. See J.A. 114-117. However, when called as a defense witness during the retrial, Estrada had no difficulty recalling the date of the crime or the fact that at approximately 1:00 p.m. Thompson had asked him if he "wanted to take [some] pieces" (*i.e.*, knives) to another prisoner. Tr. 1843-1845, 1854-1857.[22]

Gouveia claims (Br. 21-22) that his attorney's inability to locate and interview those inmates who lived in "M" Unit on the date of the murder prevented him from demonstrating that pieces of paper and a magazine bearing unidentified fingerprints, which were found in the cell where the murder occurred, had been placed there at some earlier point. Gouveia maintains that such evidence would have dispelled the adverse inference created by evidence that a piece of paper found in the cell contained his prints and those of Segura.[23] However, Gouveia apparently accom-

---

[22] Reynoso also notes (Br. 16) inmate Olvera's inability during the first trial to recall with precision the time when he saw Gouveia on the day of the murder (J.A. 98-102). During the retrial, however, Olvera testified without equivocation that on the day in question he saw Gouveia in the corridor leading to the auditorium between 12:00 and 12:30 p.m. (Tr. 1680-1681, 1727, 1740). Gouveia complains (Br. 24) that inmate Allen testified that on the day of the murder he saw Gouveia in the "K Unit" of the prison sometime between 11:00 a.m. and 1:00 p.m. and that the inexactitude of this testimony seriously compromised Allen's value as an alibi witness. The cited testimony occurred at the first trial. See J.A. 106-107. During the retrial, Allen testified that he saw Gouveia between 11:00 and 11:15 a.m. while Allen waited to use the telephone (Tr. 1549-1550). Both Reynoso (Br. 16) and Gouveia (Br. 23 n.10, 24) cite the inability of inmate Broughton to recall at the first trial the time he was eating brunch with Gouveia (see J.A. 102-104). Broughton did not testify during the retrial.

[23] We note that in the courts below Gouveia did not allege that he had been prejudiced by his inability to locate inmates

plished the same result through the testimony of inmate Macias, the occupant of the cell, and through cross-examination of the fingerprint analyst. Macias testified that he had obtained the magazine from a friend and that he had obtained writing paper from a source within the unit (Tr. 840-842). During cross-examination by Gouveia's attorney, the fingerprint analyst acknowledged that none of over 70 unidentified prints found on various items in the cell matched those of the suspects, that Gouveia's prints were beneath some blood stains, and that there was no way of determining when or how Gouveia's prints were placed on the piece of paper (*id.* at 462-467).

Respondents Mills and Pierce contend (Br. 43-44) that they were unable to locate witnesses who could testify that months before the murder other inmates had "embarked on a campaign to rid the prison of [the victim] Mr. Hall," which led to the firebombing of his cell, so that they were "wholly foreclosed" from offering "powerful exculpatory evidence" showing that those inmates themselves had reason to commit the murder. Respondents did not cite this point below as a basis for their contention that the indictment should be dismissed.[34] In any event, respondents were not foreclosed from presenting evidence that other inmates had reason to kill Hall. A prison official testified that four months before Hall's murder, his cell

---

who could testify about the presence of the paper in the cell. See J.A. 67-69; Gouveia C.A. Opening Br. 12-18; Gouveia C.A. Reply Br. 4-11.

[34] See, *e.g.*, J.A. 149-155; Mills C.R. 59, at 16-19, 23-24; Mills C.R. 73, at 6-9; 80-1540 Mills Br. 23-28; 80-1540 Pierce Reply Br. 13-18, 31-34. Indeed, the pretrial declaration of Pierce's attorney indicates that he did find witnesses who knew about threats to Hall, but that at that time they were unwilling to cooperate for various reasons (J.A. 150, 153-155).

was set on fire and he was placed in protective custody at his own request (Mills Tr. 1088-1093). A fellow inmate testified that Hall had a reputation as an informant, was engaged in gambling and drug transactions, paid protection money to another prisoner, and, long before the murder, made statements expressing fear for his life (*id.* at 1106-1109). Another inmate testified that, on the day before the murder, he overheard a conversation between Hall and respondent Mills during which Hall stated that several other inmates were pressuring him to repay a debt of several thousand dollars (*id.* at 1338-1339). On the basis of this evidence, respondents were able to argue during summation that, well before Hall was murdered, he was in "serious trouble" with other inmates (*id.* at 1655-1657).

As we explained in our opening brief (at 56-59), perusal of the record in this case confirms the conclusion of the dissenters below (Pet. App. 28a) that respondents' counsel presented "defenses of uncommon quality and vigor." The paucity of examples of prejudice offered by respondents in their answering briefs may be the best illustration of the error in the court of appeals' presumption of prejudice.

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 498570 292

(THIS PAGE INTENTIONALLY LEFT BLANK)